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departing from the days of caution and restraint?**

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Published in:
Swiss Yearbook of European Law

[Link to publication](#)

Citation for published version (APA):
Ankersmit, L. J. (2018). Dispute settlement in the current generation of trade and investment agreements of the EU: departing from the days of caution and restraint? Swiss Yearbook of European Law.

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Dispute settlement in the current generation of trade and investment agreements of the EU: foregoing the days of caution and restraint?

*Laurens Ankersmit**

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Introduction

A few years ago, the topic of international dispute settlement between the EU and third countries in trade agreements would not have attracted much attention. Before the establishment of the WTO, the EU preferred diplomatic tools for dispute settlement over more judicialized forms of dispute settlement. European Court of Justice (ECJ) Judge Allen Rosas recently remarked that in the past therefore “the approach of the EU to binding third-party settlement was one of caution and restraint”.¹

However, recent years have seen some dramatic developments in this area. On the one hand, there has been a proliferation of different and advanced forms of dispute settlement, notably in the field of investment with the Investment Court System (ICS) and the new mandate to negotiate a Multilateral Investment Court (MIC).² The origins of these developments lie with the EU’s embrace of more judicialized forms of dispute settlement following the establishment of the World Trade Organisation (WTO) combined with the EU’s policy to abandon multilateralism by negotiating an increasing number of bilateral trade agreements.³ Moreover, the expansion of the EU’s powers to investment protection with the Treaty of Lisbon saw the EU inherit from the Member States investor-state dispute settlement (ISDS), one of the most used and powerful forms of dispute settlement under international law today.⁴

On the other, the EU’s approach to international dispute settlement has attracted increasing amounts of public attention and public criticism. In particular, the inclusion of ISDS in the negotiating mandate of the Transatlantic Trade and Investment Partnership (TTIP), the EU – US trade deal has led to widespread public protest. Public opposition has also resulted in a constitutional challenge of the dispute settlement provisions in the investment chapter of the Comprehensive Economic and Trade Agreement (CETA) in the form of a request for an Opinion by Belgium (*Opinion 1/17*).⁵ At the same, European civil society and the trade union movement have also criticised the underdeveloped nature of dispute settlement provisions that apply to the labour and environmental chapters included in the new generation of trade agreements.⁶

This public criticism, by and large shared by the majority of the Members of European Parliament and a number of Member State governments, has resulted in the EU to reflect and develop its own approach to international dispute settlement in trade agreements. It is seeking to reform the system of ISDS in its investment policy and it has engaged in a reflection process

¹ *Allan Rosas*, The EU and international dispute settlement, *Europe and the World: A law review*, 2017,1, 2.

² Negotiating directives for a Convention establishing a multilateral court for the settlement of investment disputes, Council of the EU, 20 March 2018, 12981/17 ADD.

³ *Allan Rosas*, International Dispute Settlement: EU Practices and Procedures, *German Yearbook of International Law*, 2003, 284.

⁴ *Gus van Harten*, *Investment Treaty Arbitration and Public Law*, 2007.

⁵ OJ 2017 C 369. 2.

⁶ European Trade Union Confederation (ETUC), ETUC submission on the Non-paper of the Commission services on the Trade and Sustainable Development (TSD) chapters in EU Free Trade Agreements (FTAs), 2017; ClientEarth and Transport & Environment, Sustainable development and environment in TTIP, 2015, 7; European Commission, 11 July 2017, Trade and Sustainable Development (TSD) chapters in EU Free Trade Agreements (FTAs), 5

regarding the enforcement of labour and environmental provisions in free trade agreements. In light of this, the EU currently has three different types of dispute settlement procedures: (1) a WTO inspired quasi-judicial state-to-state mechanism that applies to its trade agreements generally, (2) the Investment Court System for the investment chapters, and (3) a special procedure for environmental and labour chapters.

This article sketches these developments and offers a critical assessment of the current approach. It argues that the EU's recent approach is certainly ambitious, but also unbalanced and may even be constitutionally unviable. While the distinct and ambitious approach of the EU to ISDS is cognisant of some of the criticism of that system, it is difficult to characterize the EU's overall approach towards dispute settlement in trade agreements as balanced or progressive. The approaches towards enforcement of economic and non-economic provisions are simply too different in that sense. Moreover, the EU's approach also risks undermining the EU's own legal and judicial system which puts further question marks behind the EU's policy.

This article proceeds as follows. It will begin with providing some of the historical background of the EU's approach towards dispute settlement in trade agreements, explaining the background against which this approach developed. Second, it will focus on the inclusion and transformation of ISDS in EU trade agreements, focussing on the changes introduced by the EU to the more traditional form of ISDS. This section will also discuss the constitutional viability of the EU's chosen approach, in particular in light of Belgium's pending request for an Opinion on CETA (*Opinion 1/17*). Third, this article will discuss the EU's approach towards enforcement of labour and environmental provisions and the recent discussion surrounding the reform of that approach.

1. The EU's approach in the past

Before the entry into force of the WTO's Dispute Settlement Understanding, the EU was a proponent of diplomatic means over judicialized means of dispute settlement with its trade partners. In all of its free trade agreements negotiated before the millennium (with the exception of the WTO agreements and the European Economic Area agreement), the EU included a diplomatic approach to dispute settlement.⁷ Essentially, this approach relies on consultations and diplomatic negotiations as the main means to resolve disputes between the parties to the agreement. Arbitration is possible under these agreements, but only by explicit consent of both parties to resort to arbitration.

The EU's experience with the WTO's dispute settlement system led to the EU gradually changing its approach and including more quasi-judicial forms of dispute settlement heavily based on the WTO model of arbitration. In fact, the EU was initially hesitant to endorse an obligatory and binding dispute settlement system during the Uruguay round leading up to the establishment of the WTO, but has since grown to become one of its most fervent users.⁸ The

⁷ Ignacio Garcia Bercero, *Dispute Settlement in European Union Free Trade Agreements: Lessons Learned?*, in: Bartels/Ortino (eds.), *Regional Trade Agreements and the WTO Legal System*, 383, 389 s.

⁸ Rosas (note 3), 288 ; Robert E. Hudec, *Enforcing International Trade Law: The Evolution of the Modern*

first agreement that allowed for compulsory arbitration following the WTO agreements was the EU-Mexico free trade agreement in 2000.⁹ Binding arbitration in FTA's became EU policy after this agreement and agreements ever since generally include a quasi-judicial model of dispute settlement. Interestingly enough, neither the EU nor a trade partner of the EU has ever resorted to this form of dispute settlement in an FTA so far.

2. Investor-state dispute settlement and the changes brought by the Lisbon Treaty

These trade agreements negotiated in the 2000's were still relatively cautious in their approach, as they only allowed for arbitration between the parties to the agreement, and did not give individuals access to dispute settlement. However, the changes introduced in the area of common commercial policy with the Lisbon Treaty (2009) resulted in a dramatic shift in the EU's approach. The Lisbon Treaty oversaw some significant changes in the overhaul of competence from the Member States to the EU level, as well as a much stronger involvement of the European Parliament in the field of external action and trade in particular. Notably, the EU obtained exclusive competence over "foreign direct investment" in the area of common commercial policy.¹⁰ This expansion of EU exclusive competence in the field of investment was mainly the result of Commission entrepreneurship during the negotiation of the EU constitutional treaty, where most Member States were more concerned with the developments of EU competence in the field of external relations generally.¹¹

As a result of this change of competence, the EU suddenly became a major player in the field of international investment law. Before this time, Member States themselves negotiated bilateral investment treaties with third countries, currently totalling over 1200 of these agreements.¹² In particular since the 1990's Member States (through clever legal advocacy by lawyers active in investment arbitration) had considerably expanded their network of investment agreements containing ISDS.¹³ The EU thus took over a field of competence of considerable Member State external activity. The hallmark of this activity was the inclusion of ISDS, not only a judicialized form of dispute settlement but also a form that was open to a particular category of individuals: foreign investors. ISDS generally allows foreign investors to submit a claim for damages against

GATT Legal System, 1993, 164 s.; *Garcia Bercero* (note 7), 389 s.

⁹ The inclusion of binding arbitration was an initiative of Mexico, see *Garcia Bercero* (note 7), 391.

¹⁰ Foreign direct investment was added to the list of exclusive competences of the EU in Article 207 TFEU.

¹¹ *Robert Basedow*, A Legal History of the EU's International Investment Policy, *The Journal of World Investment & Trade* 2016, 743; *Sophie Meunier*, Integration by Stealth: How the European Union Gained Competence over Foreign Direct Investment, *JCMS* 2017, 593.

¹² Press release, European Commission, 12 December 2012, EU takes key step to provide legal certainty for investors outside Europe, IP/12/1362

¹³ *Peter Muchlinski*, The role of preferential trade and investment agreements in international investment law: from unforeseen historical developments to an uncertain future. In: Hofmann/Schill/Tams (eds.) *Preferential trade and investment agreements: from recalibration to reintegration*, 2013, 211 s.; *Peter Muchlinski*, Corporations and the Uses of Law: International Investment Arbitration as a "Multilateral Legal Order, *Oñati Socio-Legal Series* 2011, 5.

a host state based on an alleged breach of one of the investment provisions contained in the investment agreement.¹⁴

The EU's takeover immediately raised a host of legal questions, even though politically the EU was keen initially to start negotiating international agreements containing ISDS itself in addition to state-to-state dispute settlement procedures developed since the millennium.¹⁵ A first legal question was what should happen to the 1200 existing agreements of the Member States with third countries. These agreements were now operational in a field of exclusive competence of the EU.¹⁶ Moreover, Member States began to realise that they were prevented from negotiating new agreements under the new constitutional set-up. After an initial skirmish between the Commission, the Council and the Member States, this first question was resolved with the adoption of the Grandfathering Regulation.¹⁷ The Regulation resulted in a favourable outcome for the Member States as the Regulation resulted in partially handing back powers to the Member States in line with the *Donckerwolcke* principle that Member States can act in areas of EU exclusive competence through EU authorisation.¹⁸ The Regulation provides that upon notification existing bilateral investment agreements signed before 1 December 2009 may be maintained in force until an EU agreement replaces them.¹⁹ In addition, Member States even obtained the right to negotiate new investment agreements under certain conditions subject to authorisation by the Commission.²⁰

Second, the EU and the Member States also had to resolve the question of how to determine the proper respondent in cases where a foreign investor uses an ISDS mechanism against the EU or a Member State. In other words, who should a foreign investor sue where the EU is somehow potentially involved: the EU or a Member State? This question is of considerable constitutional significance, as the allocation of powers between the EU and the Member States falls under the exclusive jurisdiction of the European Court of Justice.²¹ With the adoption of the Financial Responsibility Regulation, the EU has partially resolved this issue by regulating the conditions of financial responsibility and setting out criteria for determining the respondent in ISDS cases.²² In addition, EU agreements containing a form of ISDS provide that it is in principle the EU and not arbitration tribunals that determine the respondent if a foreign investor initiates a case.²³

¹⁴ Typically, these investment provisions contain the right to national treatment, a most-favoured nation provision, the right to be compensated for expropriation, and the right to fair and equitable treatment. These provisions have been drafted and interpreted broadly by investment tribunals over the years. See *Gus van Harten*, *Investment Treaty Arbitration and Public Law*, 2007.

¹⁵ Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions of 7 July 2010, Towards a comprehensive European international investment policy, COM(2010) 343 final.

¹⁶ Article 3 (1) (e) TEU and Article 207 TFEU

¹⁷ Regulation 1219/2012, OJ 2012 L 351, 40

¹⁸ CJUE, aff. 41/76, ECLI:EU:C:1976:182 (*Donckerwolcke*), cons. 32.

¹⁹ Article 3 Regulation 1219/2012 (Note 17).

²⁰ Article 9 Regulation 1219/2012 (Note 17). Notably the Commission cannot authorize such negotiations if these investment agreements are in conflict with EU law.

²¹ CJUE, aff. C-459/03, ECLI:EU:C:2006:345 (*Commission v Ireland (Mox Plant)*), cons. 123 ; CJUE, aff. A-2/13, ECLI:EU:C:2014:2454 (*Accession to the ECHR*), cons. 225.

²² Regulation 912/2014, OJ 2014 L 257, 121.

²³ See for instance article 8.21 CETA, OJ 2017 L 11, 23.

However, it remains to be seen whether the European Court of Justice will be satisfied with these solutions, in particular where investment tribunals will nonetheless be able to express themselves on the division of powers between the EU and the Member States.²⁴

Third, the scope of the EU's powers in the field of investment was still an open question. While the EU obtained exclusive competence over foreign direct investment, the EU Treaties remained silent on the question whether the EU also had exclusive competence over areas other than foreign direct investment. In a quintessential legal skirmish between the Council and the Commission over the scope of the EU's powers under the common commercial policy, the Commission decided to request an Opinion from the European Court of Justice pursuant Article 218 (11) TFEU over the scope of the EU's exclusive powers to conclude the EU – Singapore Free Trade Agreement.²⁵

Opinion 2/15 certainly did not deliver what the Commission had argued for in the field of investment. The Court found that both the regulation of other types of investment than direct investment and the introduction of investor-state dispute settlement did not fall within the exclusive competence of the EU, but is shared competence with the Member States.²⁶

In relation to other types of investment, the ECJ found that the EU had shared competence with the Member States based on Article 216 (1) TFEU. In an innovative interpretation of the Treaties, the ECJ found that this article could be used as a legal basis for shared competence to conclude provisions on such investment because “it may prove necessary in order to achieve, within the framework of the Union's policies, one of the objectives referred to in the Treaties' [namely the objective of free movement of capital between the EU and third states under article 63 TFEU], within the meaning of Article 216(1) TFEU”, despite the fact that Article 216 does not lay down procedures to be followed for the adoption of EU legal acts and thus raises questions how the EU should exercise its competence externally in this field.²⁷

In relation to ISDS, the ECJ found that such a regime cannot be established without the Member States' consent, because it “removes disputes from the jurisdiction of the courts of the Member States”.²⁸ A key characteristic of ISDS is that it offers foreign investors an alternative forum of judicial relief to domestic courts. In fact, most ISDS mechanisms allow foreign investors to bring a claim before an investment tribunal without exhausting domestic remedies. Under customary

²⁴ *Hannes Lenk*, Issues of Attribution: Responsibility of the EU in Investment Disputes under CETA, *Transnational Dispute Management* 2016, 1.

²⁵ Press release, European Commission, 30 October 2014, Singapore: The Commission to Request a Court of Justice Opinion on the trade deal, IP/14/1235. The Opinion was eventually lodged with the ECJ under the Juncker Commission on 10 July 2015

²⁶ CJUE, aff. A-2/15, ECLI:EU:C:2017:376 (EUSFTA), cons. 244, 292.

²⁷ *Ibid.* Puzzlingly the ECJ also found in paragraph 244 that ‘It follows [that the section of the agreement concerning other types of investment than foreign direct investment] cannot be approved by the European Union alone’. In the recent *OTIF* case, the ECJ clarified that it remains possible for the EU to conclude international agreements in this area alone, granted that the Council takes the decision that it is the EU that will exercise this shared competence. According to the Court, it “did no more than acknowledge the fact that, as stated by the Council in the course of the proceedings relating to that Opinion, there was no possibility of the required majority being obtained within the Council for the Union to be able to exercise alone the external competence that it shares with the Member States in this area.” See CJUE, aff. C-600/14, ECLI:EU:C:2017:935 (Commission v Germany (OTIF)), cons. 68

²⁸ CJUE, aff. A-2/15, ECLI:EU:C:2017:376 (EUSFTA), cons. 292

international law and international human rights law by contrast, exhausting local remedies is a precondition for a claim before an international court or tribunal.²⁹ It is this “discretion” offered to foreign investors to choose between domestic courts and investment tribunals that led the ECJ to conclude that the competence to establish such a regime “cannot be of a purely ancillary nature” to the substantive investment provisions and therefore required Member State consent. This is a departure of established case-law of the ECJ that the competence to conclude institutional provisions follows the substantive competences of the EU and underlines the ECJ’s attachment to the powers of the courts of the Member States within the judicial architecture of the EU.³⁰ It may also signal the ECJ’s possible reluctance to find ISDS compatible with EU law, a question further explored below.³¹

As a result, the EU and the Member States are dependent on each other for the conclusion of international agreements in the field of investment. The required Member State ratification of the investment parts of EU trade agreements has led the Commission to propose a split of investment parts from the EU’s future trade agreements for the EU-Singapore FTA and the EU-Japan FTA (JEFTA).³² The Commission is also planning to exclude ISDS altogether from its future trade agreements with New Zealand and Australia.³³ The Commission’s plans to separate investment provisions from its trade agreements for some of the agreements under negotiation are no doubt inspired by a willingness to avoid Member State scrutiny through the national ratification process of these countries. In the fall of 2015, the resistance put up by several regional governments in Belgium led to the delay of the signature of Belgium to the CETA and Belgium’s commitment to request an Opinion of the ECJ on the compatibility of the investment provisions with the EU Treaties.

2.1 The EU’s new approach towards investment: the Investment Court System

²⁹ *Martin Dietrich Brauch*, Exhaustion of Local Remedies in International Investment Law, IISD Best Practices Series 2017; *Silvia D’Ascoli and Kathrin Maria Scherr*, The rule of prior exhaustion of local remedies in the international law doctrine and its application in the specific context of human rights protection, EUI Working Papers Law 2007.

³⁰ Citing previous case-law the ECJ held in para. 276 that the “*Court has already had occasion to point out that the competence of the European Union to enter into international commitments includes competence to couple those commitments with institutional provisions. Their presence in the agreement has no effect on the nature of the competence to conclude it. Those provisions are of an ancillary nature and therefore fall within the same competence as the substantive provisions which they accompany*”.

³¹ See section 2.2

³² The JEFTA does not include ICS or ISDS and it is unclear whether Japan and the EU will reach a separate agreement on investment as Japan does not endorse the EU’s ICS proposal. 18 April 2018, European Commission, proposal for a Council decision on the conclusion of the Economic Partnership Agreement between the European Union and Japan COM(2018) 192 final. For Singapore, the EU has proposed to the Council to conclude two separate agreements: 18 April 2018, European Commission, Proposal for a Council Decision on the conclusion of the Investment Protection Agreement between the European Union and its Member States, of the one part, and the Republic of Singapore of the other part COM(2018) 194 final and 18 April 2018, European Commission, Proposal for a Council Decision on the conclusion of the Free Trade Agreement between the European Union and the Republic of Singapore COM(2018) 196 final.

³³ Reported after civil society met with the Dutch government 15 May 2018.

Taking a closer look at the approach of the EU to international dispute settlement in the area of investment, we see that the EU has taken a new and innovative approach to the traditional forms of ISDS and has referred to this new approach as the ‘Investment Court System’.³⁴ This is the result of the major controversy and criticism of the system in the context of the TTIP negotiations by both citizens and the European Parliament. In the context of a public consultation on ISDS in the fall of 2014, almost all of the 150 000 responses were negative about ISDS.³⁵ Moreover, the European Parliament called for a major overhaul of ISDS in its TTIP resolution of 8 July 2015.³⁶

In the fall of 2015 the Commission launched its ICS proposal in the context of the TTIP negotiations and it is currently featured in most of the EU’s new trade agreements, such as CETA, the EU-Singapore investment agreement, the EU-Vietnam FTA, and the new EU-Mexico FTA. With ICS, the Commission is seeking to preserve the key features of ISDS, but at the same time modify some of the most controversial aspects of ISDS.

In relation to what has been preserved, the ICS seeks to retain the basic feature of ISDS as a mechanism that allows investors to bring claims for damages against host states before an international tribunal where host states have breached investor rights contained in the investment chapter, such as the right to be compensated for expropriation, and the right to fair and equitable treatment.

Furthermore, there are several noteworthy traditional ISDS elements in the ICS. First, in contrast to some investment agreements, including agreements concluded by Member States, the ICS only allows claims by investors against host governments, and does not allow for claims or counterclaims against investors.³⁷ ICS is thus a one-way street, and thus does not address one of the fundamental criticisms of ISDS that the system is unbalanced.³⁸ Second, the ICS preserves the right of investors to directly seize these tribunals, and does not require them to exhaust domestic remedies.³⁹ However, parallel claims are not permitted and an investor must choose between domestic courts and the international tribunal.⁴⁰ In other words, even under the EU’s new approach investment tribunals remain an alternative and rival to domestic courts for disputes between foreign investors and host-governments.

On the other hand, the ICS does envision significant changes when it comes to the selection of tribunal members and operation of the international tribunals. One of the Commission’s aims is to move away from ad hoc arbitration to a more institutionalised form of dispute settlement.

³⁴ See chapter 8 of Comprehensive Economic and Trade Agreement (CETA) between Canada, of the one part, and the European Union and its Member States, of the other part, OJ 2017 L 11, 23; for more information on the background of this proposal see Press release, European Commission, 12 November 2015, EU finalises proposal for investment protection and Court System for TTIP, IP/15/6059

³⁵ Commission Staff Working Document, European Commission, 13 January 2015, SWD(2015) 3 final.

³⁶ Resolution, European Parliament 8 July 2015, Negotiations for the Transatlantic Trade and Investment Partnership (TTIP), (2014/2228 (INI))

³⁷ Article 8.21 (1) CETA (Note 34)

³⁸ *Alessandra Arcuri*, The Great Asymmetry and the Rule of Law in International Investment Arbitration, in: Sachs/Johnson/Coleman (eds.), Yearbook on International Investment Law and Policy 2017 (Forthcoming 2018), *van Harten*, (Note 4).

³⁹ Article 8.22 (1) (f-g) CETA (Note 34)

⁴⁰ *Ibid.* The approach under ICS is referred to as the so-called ‘no U-turn approach’.

In this context, the Commission has looked for inspiration to the WTO approach to the selection of arbitrators and operation of dispute settlement. The ICS requires tribunal members to be selected from a permanent roster of 15 adjudicators. ISDS, by contrast, operates by party appointment, whereby both the investor and the host government are involved in the selection of the arbitrators.⁴¹ ICS also puts these roster members on a retainer fee, in order to reduce financial incentives to hear and consider frivolous claims by investors and make them less financially dependent on investors bringing claims more generally.⁴² However, tribunal members still receive daily remuneration for their work once they are appointed as a member of a tribunal under ICS.⁴³

Moreover, the ICS envisages an appeal mechanism. This appeal mechanism has been included to ensure greater consistency and coherence in the decisions of these tribunals, one of the criticisms of ISDS.

The ICS is still very much a halfway solution between ad hoc adjudication to a fully permanent court. The EU is committed to move away completely from ad hoc arbitration in the field of investment and introduce a so called Multilateral Investment Court (MIC), a permanent international court that would be competent to hear all forms of investment disputes based on investment treaties. This spring the Council and the EU Member States have mandated the Commission to negotiate a Convention establishing a multilateral court for the settlement of investment disputes.⁴⁴ The Commission would like to see such a court to be negotiated in the context of current discussions at UNCITRAL on the reform of ISDS.⁴⁵ So far, however, reception for a MIC has been lukewarm internationally with only Canada fully endorsing the EU's new approach for a MIC.⁴⁶

2.2 Compatibility of the Investment Court System with the Treaties

Perhaps one of the most controversial legal issues about dispute settlement in the current generation of trade and investment agreements of the EU is whether the ICS is compatible with the EU Treaties.⁴⁷ As the Court of Justice has held, “the founding treaties of the EU, unlike ordinary international treaties, established a new legal order, possessing its own institutions, for

⁴¹ Articles 8.27 and 8.28 CETA (Note 34); *David Gaukrodger*, *Appointing Authorities and the Selection of Arbitrators in Investor-State Dispute Settlement: An Overview*, OECD Consultation Paper 2018.

⁴² Article 8.27 (12) CETA (Note 34).

⁴³ Article 8.27 (14) CETA (Note 34).

⁴⁴ See above Note 2.

⁴⁵ <<http://trade.ec.europa.eu/doclib/press/index.cfm?id=1608&title=The-Multilateral-Investment-Court-project>> (consulté le 15.06.2018)

⁴⁶ See several blogposts by Anthea Roberts reporting on the UNCITRAL reform process at <www.ejiltalk.org> (consulté le 15.06.2018)

⁴⁷ See for a more extensive discussion with references to literature *Laurens Ankersmit*, *The compatibility of investment arbitration in EU trade agreements with the EU judicial system*, *Journal for European Environmental & Planning Law*, 2016, 46 s.; *Szilard Gáspár-Szilágyi*, *A Standing Investment Court under TTIP from the Perspective of the CJEU*, *Journal of World Investment and Trade*, 2016, 701 s.; *Juliane Kokott and Christoph Sobotta*, *Investment Arbitration and EU law*, *Cambridge Yearbook of European Legal Studies*, 2016, 3 s.

the benefit of which the Member States thereof have limited their sovereign rights, in ever wider fields, and the subjects of which comprise not only those States but also their nationals”.⁴⁸ This unique legal order posits itself between and independently of the national legal orders of the Member States and the international legal order. Its autonomy is protected by the courts of the Member States and the Court of Justice acting as “guardians” of that legal order.⁴⁹

Moreover, through an intricate system of direct and indirect actions, the EU has established a “complete system of judicial remedies” for individuals, Member States, the EU institutions and its agencies and bodies.⁵⁰ That system was created to ensure that the special characteristics of EU law are preserved (inter alia the EU’s institutional framework, including its judicial system, as well as the direct effect and primacy of EU law), that EU law is interpreted uniformly and consistently, that EU law is fully applied, and that individuals’ rights are judicially protected.⁵¹

As the particularities of that legal order originate from the EU’s unique judicial set up and are also preserved by the EU’s judiciary,⁵² the European Court of Justice has been reluctant in accepting international courts and tribunals that may affect the autonomy of the EU’s legal order. In five out of seven Opinion procedures on the question of compatibility, it has accepted the possibility of the EU subjecting itself to international dispute settlement, but nonetheless ruled against the creation of or accession to an international court or tribunal, including the EU’s accession to the European Court on Human Rights.⁵³

This is not to say that the Treaties in principle do not permit international agreements providing for state-to-state dispute settlement between the EU and third countries, such as the WTO’s dispute settlement body. Such state-to-state dispute settlement mechanisms do not encroach on the powers of the EU’s judiciary, because Article 19 TEU and TFEU Part Six, title 1, chapter 1, section 5 does not grant the EU courts the exclusive power to hear such disputes. Things are different however where international tribunals rival with the powers of the EU’s judiciary, this is particular so for disputes that involve individuals.

The Commission itself has long opposed investment agreements concluded between Member States (intra-EU BITs) for the very reason that ISDS mechanisms in those agreements are incompatible with EU law. It obtained a key victory with the Court’s ruling in *Achmea* where the ECJ found such a mechanism in a Dutch-Slovak investment agreement incompatible with EU law.⁵⁴ Currently, a request for an Opinion on the compatibility of the ICS mechanism in CETA is pending before the European Court of Justice (*Opinion 1/17*).⁵⁵ This request was the result of the Walloon parliament taking civil society concerns over this issue seriously and making a request

⁴⁸ CJUE, aff. A-2/13, ECLI:EU:C:2014:2454 (Accession to the ECHR), cons. 157.

⁴⁹ CJUE, aff. A-1/09, ECLI:EU:C:2011:123 (European and Community Patents Court), cons. 66.

⁵⁰ CJUE, aff. A-1/09, ECLI:EU:C:2011:123 (European and Community Patents Court), cons. 70.

⁵¹ CJUE, aff. A-2/13, ECLI:EU:C:2014:2454 (Accession to the ECHR), cons. 174-175.

⁵² CJEU, aff. C-284/16, ECLI:EU:C:2018:158 (*Achmea*).

⁵³ See for an overview *Rosas*, (Note 1)

⁵⁴ CJEU, aff. C-284/16, ECLI:EU:C:2018:158 (*Achmea*).

⁵⁵ OJ 2017 C 369. 2.

for an Opinion by the Belgian government a precondition for the authorisation to sign the agreement.⁵⁶ The significant constitutional significance of this case is highlighted by the fact that the ECJ decided to refer the case to the Full Court deeming the case of ‘*exceptional importance*’.⁵⁷

This article will touch upon three key issues that the ECJ will consider regarding the compatibility of ICS with the Treaties. In a nutshell, the ICS mechanism may (1) negatively affect the powers of the courts of the Member States as protected under the EU Treaties, (2) negatively affect the powers of the CJEU, and (3) violate non-discrimination provisions contained in the EU Treaties and the Charter of Fundamental Rights.

Member State courts

Perhaps one of the most important features of the EU’s unique legal order is the role of Member State courts in the application and interpretation of EU law. Article 19 TEU requires the national courts and tribunals and the Court of Justice to ensure the full application of EU law in all Member States and to ensure judicial protection of the rights of individuals under that law. The courts of the Member States have a particularly important role to play through the preliminary reference procedure, “which, by setting up a dialogue between one court and another, [...] has the object of securing uniform interpretation of EU law [...], thereby serving to ensure its consistency, its full effect and its autonomy as well as, ultimately, the particular nature of the law established by the Treaties [...]”⁵⁸ Article 267 is therefore essential for avoiding divergences in the interpretation of EU law and giving EU law its full effect, as well as for ensuring the protection of individual rights.⁵⁹ It is therefore no surprise that the ECJ has referred to Article 267 as the “keystone” of the Union’s judicial system and the courts of the Member States, as “guardians” of the Union’s legal order.⁶⁰

ICS presents a threat to the proper functioning of the preliminary reference procedure. In *Achmea*, the ECJ found that ISDS “derive[s] from a treaty by which Member States agree to remove from the jurisdiction of their own courts, and hence from the system of judicial remedies which [EU law] requires them to establish in the fields covered by EU law, disputes which may concern the application or interpretation of EU law”.⁶¹ In other words, the ECJ views ISDS mechanisms as a threat to the EU’s judicial system because disputes between investors and states that are liable to relate to the interpretation of EU law are taken outside of the EU’s judicial

⁵⁶ *Paul Magonette*, CETA: Quand l’Europe déraile, 2017, 32 s.; Résolution 212, 25 Avril 2016, Résolution sur l’Accord économique et commercial global (AECG) Doc. 212 (2014-2015).

⁵⁷ Article 16 of the Statute of the Court of Justice of the European Union, OJ 2018 L 228, 1.

⁵⁸ CJUE, aff. A-2/13, ECLI:EU:C:2014:2454 (Accession to the ECHR), cons. 176.

⁵⁹ CJUE, aff. A-1/09, ECLI:EU:C:2011:123 (European and Community Patents Court), cons. 83 and 84.

⁶⁰ CJUE, aff. A-1/09, ECLI:EU:C:2011:123 (European and Community Patents Court), cons. 66; CJUE, aff. A-2/13, ECLI:EU:C:2014:2454 (Accession to the ECHR), cons. 176.

⁶¹ CJUE, aff. C-284/16, ECLI:EU:C:2018:158 (*Achmea*), cons. 55, see also CJUE, aff. A-2/15, ECLI:EU:C:2017:376 (EUSFTA), cons. 292.

system. This is contrary to EU law, because the EU Treaties require the EU's judiciary to resolve such disputes.

What is more, the ECJ casts a particular wide net as to what kinds of disputes need to be resolved by the EU's judiciary. In *Achmea*, the Court found that disputes an arbitration tribunal may be called to resolve “are liable to relate to the interpretation or application of EU law”.⁶² For the ECJ, the mere fact that a tribunal could “take account in particular of the law in force of the contracting party concerned and other relevant agreements between the contracting parties” was sufficient to come to that conclusion.⁶³ Thus, the ECJ is not so much concerned with actual conflict between EU law and international investment law. It is concerned that a dispute that may potentially involve questions of EU law is removed from EU courts. A possible solution to this legal obstacle would be to introduce a requirement to exhaust domestic remedies first before foreign investors can bring a claim before an ICS tribunal.

The European Court of Justice

As the corollary to removing disputes from the jurisdiction of Member State courts that are liable to relate to the interpretation of EU law, the powers of the ECJ itself are also adversely affected. This is so because Member State courts would no longer be able for such disputes to make preliminary references and therefore allow the ECJ to determine the reach, the validity, and content of EU law. One of the key issues here is that the ECJ must have the last say over how EU law is interpreted. In *Opinion 2/13* the ECJ took issue with the fact that the ECtHR would not be required to involve the ECJ for the interpretation of secondary EU law, because the ECJ must be able to provide for a definite interpretation of EU law.⁶⁴

In relation to ICS, the problem is that the ICS does not envisage any system that would enable the prior involvement of the Court of Justice if its tribunals would be faced with questions of EU law. This problem relates firstly to the interpretation of the international agreement itself. It is settled case-law of the Court of Justice that “the provisions of the agreement, from the coming into force thereof, form an integral part of [Union] law.”⁶⁵

Moreover, in the past, investment arbitration tribunals have regularly been faced with questions of domestic law.⁶⁶ This is particularly so because often the investment treaties do not foresee a

⁶² CJUE, aff. C-284/16, ECLI:EU:C:2018:158 (*Achmea*), cons. 39.

⁶³ CJUE, aff. C-284/16, ECLI:EU:C:2018:158 (*Achmea*), cons. 40–42.

⁶⁴ CJUE, aff. A-2/13, ECLI:EU:C:2014:2454 (*Accession to the ECHR*), cons. 246-247

⁶⁵ CJUE, aff. 181/73, ECLI:EU:C:1974:41 (*Haegeman*), cons. 5.

⁶⁶ *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000, paras. 79-101; *Philip Morris Brands Sàrl, Philip Morris Products S.A. and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award, 8 July 2016, paras. 177-581; *Eastern Sugar B.V. (Netherlands) v. The Czech Republic*, SCC Case No. 088/2004, Award, 12 April 2007, paras. 137-180; *Achmea B.V. v. The Slovak Republic*, UNCITRAL, PCA Case No. 2008-13, Award, 7 December 2012, paras. 273-276; *Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7, Award, 13 November 2000, paras. 69-71; *Occidental Exploration and Production Company v. The Republic of Ecuador*, LCIA Case No. UN3467, Award, 1 July 2004, paras. 117-144; *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Award,

requirement to exhaust domestic remedies. As a result, the investment tribunal is the first judicial body that is faced with questions relating to, for instance, the government's discretion under a particular domestic piece of legislation. In *Metalclad*, for instance, the central issue faced by the tribunal was whether a municipal permit for the construction of a hazardous waste landfill was required, in addition to the permits obtained by the claimant.⁶⁷ The tribunal proceeded in answering this question by interpreting Mexican law.⁶⁸

There have been several instances where arbitration tribunals have faced questions of EU law.⁶⁹ An example is how the investment tribunal in *Binder v. Czech Republic* found the general EU law principle of mutual trust a "soft-law" principle and declined to apply it.⁷⁰ In another case, a tribunal found that the international investment agreement applicable in the case was its "constitution" and must prevail over EU law in case of conflict.⁷¹ In *Eastern Sugar*, another example, the arbitration tribunal not only interpreted and assessed the Court of Justice's case-law on the meaning of "court or tribunal of a Member State" in article 267 TFEU and found that even if it had the possibility to make a preliminary reference this was not necessary "in a case where the answer is not difficult".⁷² The tribunal in question went on to determine the question whether the EU Treaties had superseded the Czech Republic's obligations under the bilateral investment agreement in question.⁷³

The ICS foresees several solutions to this problem. Firstly, ICS tribunals may consider EU law "as a matter of fact".⁷⁴ This solution is unlikely going to satisfy the ECJ in light of *Achmea* as the ECJ already took issue with investment tribunals taking account of EU law and resolving disputes that were liable to relate to the interpretation of EU law. Second, in considering EU law as a matter of fact, ICS tribunals "shall follow the prevailing interpretation given to the domestic law by the courts or authorities of that Party". As this provision does not allow for a procedure of prior involvement of the ECJ in the situation where there is no prevailing interpretation, it is equally unlikely to satisfy the ECJ. Lastly, ICS provides that "any meaning given to domestic law by the Tribunal shall not be binding upon the courts or the

25 May 2004, paras. 205 and 214; *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/7, Decision on Annulment, 21 March 2007, para. 75

⁶⁷ *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000, para. 79

⁶⁸ *Metalclad Corporation v. The United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000, paras. 79-101

⁶⁹ *Eastern Sugar B.V. (Netherlands) v. The Czech Republic*, SCC Case No. 088/2004, Award, 12 April 2007, paras. 137-180; *Achmea B.V. v. The Slovak Republic*, UNCITRAL, PCA Case No. 2008-13, Award, 7 December 2012, paras. 273-276; *Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7, Award, 13 November 2000, paras. 69-71

⁷⁰ *Binder v. Czech Republic*, Award on Jurisdiction, UNCITRAL, 6 June 2017, para. 43.

⁷¹ *RREEF Infrastructure (G.P.) Limited and RREEF Pan-European Infrastructure Two Lux S.à r.l. v. Kingdom of Spain*, ICSID Case No. ARB/13/30, Decision on Jurisdiction of 6 June 2016, para 74-77

⁷² *Eastern Sugar B.V. (Netherlands) v. The Czech Republic*, SCC Case No. 088/2004, Award, 12 April 2007, para. 137

⁷³ *Eastern Sugar B.V. (Netherlands) v. The Czech Republic*, SCC Case No. 088/2004, Award, 12 April 2007, paras. 142-180

⁷⁴ Article 8.31 CETA (Note 23).

authorities of that Party.” However, the Court of Justice has held that where “an international agreement provides for its own system of courts, including a court with jurisdiction to settle disputes between the Contracting Parties to the agreement, and, as a result, to interpret its provisions, the decisions of that court will be binding on the Community institutions, including the Court of Justice.”⁷⁵ Awards by ICS tribunals are binding on the Parties.⁷⁶ In accordance with Article 216 (2) TFEU and the Court of Justice’s case-law therefore an award which may have been based on a particular interpretation of EU law will be binding on the EU institutions, including the Court of Justice.⁷⁷

Moreover, ICS may adversely affect the exclusive jurisdiction of the Court of Justice under articles 268 and 340 TFEU concerning, the non-contractual liability of the EU institutions.⁷⁸ Under the ICS, investors and their local EU subsidiaries would be able to bring a claim against the EU for the payment of damages before a tribunal other than the Court of Justice. In that sense, it is difficult to see how ICS is would be but an extension of diplomatic protection, according to which investment agreements do not confer rights on investors themselves but only allow them, 'for convenience', to enforce the rights of their home state.⁷⁹ Under the current state of international investment law this is no longer accepted by investment arbitration tribunals. In *CPI v Mexico* for instance, an ICSID tribunal held that “that an investor which brings a claim is seeking to enforce what it asserts are its own rights under the Treaty and not exercising a power to enforce rights which are actually those of the State”.⁸⁰ National courts have taken the same position. For instance, the UK Court of Appeal in *Ecuador v Occidental* has held that “it would seem to us both artificial and wrong in principle to suggest that the investor is in reality pursuing a claim vested in his or its home state, and that the only improvement in comparison with the traditional state protection for investors is procedural.”⁸¹

Indeed, even if ICS can formally be distinguished from Article 340 TFEU, it will likely in effect impinge on the exclusive jurisdiction of the EU courts to rule on the non-contractual liability of the EU and to hear claims by individuals. The Court of Justice is the only court that can order compensation for damages caused by the institutions to individuals. This means that the Court of Justice has the exclusive competence to decide the conditions and standards under which the EU can be found liable for non-contractual damages.

⁷⁵ CJUE, aff. A-1/91, ECLI:EU:C:1991:490 (European Economic Area), cons. 39.

⁷⁶ See for instance article 8.41 CETA (Note 23).

⁷⁷ Article 216 (2) TFEU; CJUE, aff. A-1/91, ECLI:EU:C:1991:490 (European Economic Area), cons. 39.

⁷⁸ CJUE, aff. C-377/09, ECLI:EU:C:2010:459 (Hanssens Ensich), cons. 16; CJUE, aff. C-275/00, ECLI:EU:C:2002:711 (First NV and Franex NV), cons. 43; CJUE, aff. C-282/90, ECLI:EU:C:1992:124 (Vreugdenhil), cons. 14; CJUE, aff. 281/84, ECLI:EU:C:1987:3 (Zuckerfabrik Bedburg AG and others), cons.12; CJUE, aff. 101/78, ECLI:EU:C:1979:38 (Granaria BV), cons. 14.

⁷⁹ This argument has been made by the Commission in a legal instruction to the Member States in the procedure of Opinion 1/17.

⁸⁰ *CPI v Mexico*, ICSID Case No. ARB(AF) 04/01, Decision on responsibility, 15 Jan 2008, para 174

⁸¹ Court of Appeal, *Ecuador v Occidental*, [2006] QB 432, para 17

Currently, the Court of Justice employs high standards, both procedurally and substantively, in allowing claims for damages.⁸² For the Court of Justice, the “exercise of the legislative function must not be hindered by the prospect of actions for damages whenever the general interest of the Community requires legislative measures to be adopted which may adversely affect individual interests.”⁸³ Accordingly, it is very difficult to claim damages for lawful acts of the EU.⁸⁴ The stricter approach by the Court of Justice towards damages claims is further exemplified by the obligation of the injured party to “show reasonable diligence in limiting the extent of the loss or damage, or risk having to bear the loss or damage himself”.⁸⁵

It is unlikely that ICS tribunals would be as deferential towards EU institutions as the Court of Justice in that sense. The very purpose of ICS is to manage political risks, or more specifically to limit the regulatory powers of the host state, in order to protect foreign investors from arbitrary or discriminatory actions. The context and aim of agreements containing ICS is therefore very different from the EU Treaties, leading to a divergent interpretation of the responsibilities of EU institutions in certain circumstances.

Non-discrimination

A third issue the ECJ is faced with in *Opinion 1/17* is the discriminatory nature of ICS. In the case of CETA, Canadian investors and their EU subsidiaries have the possibility to go to an ICS tribunal whereas other EU investors, EU undertakings, and EU citizens do not. This raises new and complex questions whether such a system is compatible with the non-discrimination provisions in both the EU Treaties and the Charter of Fundamental Rights.⁸⁶ It may lead to discrimination between EU undertakings on grounds of nationality prohibited by the EU’s internal market provisions for instance, but it may equally lead to discrimination between EU citizens and Canadian contrary to Article 20 of the Charter.⁸⁷ If such discrimination exists, it would require a public interest justification.⁸⁸

3. Enforcement of labour and environmental provisions

The EU’s approach to dispute settlement over labour and environmental provisions in the current generation of FTA’s is also subject to controversy and debate. That debate has centred on the

⁸² CJUE, aff. 5/71, ECLI :EU:C:1971:116 (Aktien-Zuckerfabrik Schöppenstedt), cons. 11; CJUE, aff. C-352/98P, ECLI :EU:C:2000:361 (Bergaderm), cons. 43.

⁸³ CJUE, aff. C-46/93 & C-48/93, ECLI :EU:C:1996:79 (Factortame), cons. 45.

⁸⁴ CJUE, aff. C-120 & 121/06P, ECLI:EU:C:2008:476 (FIAMM and Fedon), cons. 175-176.

⁸⁵ CJUE, aff. C-445/06, ECLI:EU:C:2009:178 (Danske Slagterier), cons. 61.

⁸⁶ See literature (Note 47).

⁸⁷ Articles 49, 54, 56, and 63 TFEU

⁸⁸ The Court of Justice has held that it will only invalidate an EU measure where it “*is manifestly inappropriate having regard to the objective which the competent institution is seeking to pursue*”. See CJUE, aff. C-154/04 & C-155/04, ECLI:EU:C:2005:449 (National Association of Health Stores and Others), cons. 52.

soundness of the EU's approach to have weaker dispute settlement provisions for those provisions that do not provide for either sanctions or penalties for non-compliance. The approach has euphemistically been labelled a "cooperative" rather than a more "punitive" approach towards environmental and labour issues in trade agreements.⁸⁹ The origins of this approach lie with the position on sustainable development in the WTO context adopted in the Council Conclusions of October 1999 where the EU committed to a "firm opposition to any sanctions-based approaches" to labour and trade related disputes in the WTO context.⁹⁰ By contrast, the United States and Canada have both introduced compliance mechanisms of environment and labour provisions in their trade agreements that can result in sanctions or penalties.⁹¹

In a nutshell, the Parties to these FTAs do not have access to the general dispute settlement provisions of the FTA and only have recourse to the rules and procedures provided for in the dedicated labour and environmental chapters.⁹² These chapters provide that a Party may request consultations regarding any matter arising under these chapters with the other Party. Parties are generally obliged to submit sufficient information on the issue and by consensus may seek information from other persons or organisations. Where a matter is not satisfactorily addressed through consultations a Party may request a Panel of Experts with relevant expertise in environmental or labour law to be convened to examine the matter. However, crucially, the report of the Panel of Experts has no real teeth as it is neither binding nor can it result in sanctions or penalties. If the report finds a Party in non-compliance, Parties are only required to "engage in discussions" and "endeavour" to identify an appropriate measure or to decide upon a mutually satisfactory action plan. In these discussions, the Parties are only required to take into account the report of the Panel of Experts.⁹³

The EU's approach has come under increasing criticism by the European Parliament and civil society and trade unions.⁹⁴ In its TTIP resolution of 8 July 2015, the European Parliament has underlined the importance of enhancing the credibility of environmental and labour commitments by recommending the Commission to "ensure that the sustainable development chapter is binding and enforceable".⁹⁵ In particular social-democratic political groups from Germany have actively

⁸⁹ See for a helpful overview of the contrasting approaches taken between the EU and the United States, *Sikina Jinnah and Elisa Morgera*, Environmental Provisions in American and EU Free Trade Agreements: A Preliminary Comparison and Research Agenda, RECIEL, 2013, 324 s.

⁹⁰ Council Conclusions, Council of the EU, 26 October 1999, WTO: Preparation of the Third Ministerial Conference - Council Conclusions, 12121/99. See also the submission of the Commission in its Request for an Opinion in *Opinion 2/15* at paragraph 472 on file with the author. See also Rok Žvelc, Environmental integration in EU trade policy: the Generalised System of Preferences, trade Sustainability Impact Assessments and Free Trade Agreements, in: Morgera (ed), *The External Environmental Policy of the European Union: EU and International Law Perspectives*, 2012, 174 s.

⁹¹ See above (Note 89). This approach has led to the United States bringing one case against Guatemala for non-compliance with the labour provisions in the FTA, see for a discussion *Ciaran Cross*, Failure by design: did the US choose to lose the Guatemala labour dispute?, *International Union Rights*, 2017.

⁹² See for instance articles 23.11 and 24.16 CETA (Note 23).

⁹³ Articles 23.10 and 24.15 CETA (Note 23).

⁹⁴ See references at Note 6.

⁹⁵ Resolution, European Parliament 8 July 2015, Negotiations for the Transatlantic Trade and Investment Partnership (TTIP), (2014/2228 (INI)), at 2. (d) (ii-iv).

sought to ensure that such provisions are subject to a sanctions mechanism and has made concrete textual proposals in that regard.⁹⁶

While the Commission has sought to engage in the debate with civil society on the reform of its sustainable development chapters through two non papers, it has firmly resisted any reform of the enforcement of these provisions.⁹⁷ It has highlighted various issues it perceives with a model based on sanctions that include the EU's lack of experience, the broad scope of the EU's provisions that would be unsuitable to such an approach, the interaction with international commitments in environmental and labour fora and organisations, and the reluctance of trade partners to engage on this issue.⁹⁸ In the second non-paper the Commission noted that 'that the absence of consensus on a sanctions-based model makes it impossible to move to such an approach.'⁹⁹ It also highlighted the problems that would come from quantifying the economic damage that would result from non-compliance of labour and environmental matters.

A number of points of criticism can be raised against the Commission in this regard. The Commission position reflects a bias against environmental and social norms over economic norms contained in the EU's trade agreements. The type of dispute settlement and enforcement chosen reflects the importance attached by the drafters towards the norms subjected to them.¹⁰⁰ If the Commission believes that sanctions or penalties do not result in better compliance by the Parties with environmental or labour norms contained in the agreement, one may equally question why the same reasoning does not apply to the other parts of the agreement that have stricter dispute settlement and compliance mechanisms, in particular the Investment Court System. Equally, the Commission's position appears to reflect a position that the normative justification for sanctions can only be economic injury to the other Party or its investors. This is an overly simplified and biased approach towards the rationale of enforcement. It is well known that environmental, social, or human rights violations are less economically quantifiable, among other reasons because these interests may be more diffuse or future-oriented.¹⁰¹ Moreover, injury to the other Party may not be the only reason to seek strong enforcement mechanisms for environmental and social norms. One may want to ensure compliance with norms equally because Parties consider these norms morally just or so important that economic incentives should be in place to ensure such compliance.

⁹⁶ See the letter by Member of European Parliament Bernd Lange to Commissioner Cecilia Malmström of 10 March 2016 < <http://ec.europa.eu/carol/index.cfm?fuseaction=download&documentId=090166e5a712f89b> > (consulté le 15.06.2018), see also the Model Labour Chapter in EU Trade Agreements by the Friedrich-Ebert-Stiftung < https://www.fes-asia.org/fileadmin/user_upload/documents/2017-06-Model_Labour_Chapter_DRAFT.pdf > (consulté le 15.06.2018)

⁹⁷ Non-paper, European Commission, 11 June 2017, Trade and Sustainable Development (TSD) chapters in EU Free Trade Agreements (FTAs); Non-paper, European Commission, 26 February 2018, Feedback and way forward on improving the implementation and enforcement of Trade and Sustainable Development chapters in EU Free Trade Agreements.

⁹⁸ Non-paper, European Commission, 11 June 2017, Trade and Sustainable Development (TSD) chapters in EU Free Trade Agreements (FTAs), 8-9.

⁹⁹ Non-paper, European Commission, 26 February 2018, Feedback and way forward on improving the implementation and enforcement of Trade and Sustainable Development chapters in EU Free Trade Agreements, 3.

¹⁰⁰ And small administrative fine is generally reserved to offences that society considers less serious than offences that result in prison sentences for instance.

¹⁰¹ *Laurens Ankersmit*, Green Trade and Fair Trade in and with the EU, 2017, 208 s.

The position of the Commission is also at odds with the way the European Court of Justice has viewed these environmental and social norms in trade agreements post-Lisbon. In *Opinion 2/15 (EUSFTA)* the Court not only took a different view on the availability of sanctions for social and environmental provisions, it also took a less myopic view on the rationale and objectives of EU trade agreements.¹⁰² In relation to the latter, the Court noted that the Lisbon treaty “differs appreciably from the EC Treaty previously in force, in that it includes new aspects of contemporary international trade in that policy” which according to the Court “constitutes a significant development of primary EU law”. It noted that Articles 9, 11, 205, 207 (1) TFEU and Article 21 TEU create an obligation on the EU to integrate the objectives of sustainable development linked to preservation and improvement of the quality of the environment and the sustainable management of global natural resources into the conduct of its common commercial policy.¹⁰³ The Court concluded that “the objective of sustainable development henceforth forms an integral part of the common commercial policy.”¹⁰⁴

Second and in relation to the issue of sanctions, the Court, unlike Advocate General Sharpston, found that the entire sustainable development chapter (Chapter 13) in the EUSFTA fell within the scope of the common commercial policy. In reaching this conclusion, the Court made the following statement:

“Finally, the link which the provisions of Chapter 13 of the envisaged agreement display with trade between the European Union and the Republic of Singapore is also specific in nature **because a breach of the provisions concerning social protection of workers and environmental protection**, set out in that chapter, **authorises the other Party** — in accordance with the rule of customary international law codified in Article 60(1) of the Convention on the law of treaties, [...] — **to terminate or suspend the liberalisation**, provided for in the other provisions of the envisaged agreement, **of that trade.**”¹⁰⁵
[emphasis added]

For the Court, therefore, non-compliance with provisions in this chapter could constitute a material breach of the agreement. Indeed, the Court considers that the sustainable development chapter “plays an essential role in the agreement” and that the agreement operates under a form of conditionality “by making liberalisation of that trade subject to the condition that the Parties comply with their international obligations concerning social protection of workers and environmental protection”.¹⁰⁶

This conditionality approach is quite similar to how the EU has dealt with human rights issues in trade agreements in the past, although such clauses have their own specificities.¹⁰⁷ There, respect for human rights is considered an essential element of an agreement for which a violation

¹⁰² CJUE, aff. A-2/15, ECLI:EU:C:2017:376 (EUSFTA).

¹⁰³ CJUE, aff. A-2/15, ECLI:EU:C:2017:376 (EUSFTA), cons. 141-146.

¹⁰⁴ CJUE, aff. A-2/15, ECLI:EU:C:2017:376 (EUSFTA), cons. 147.

¹⁰⁵ CJUE, aff. A-2/15, ECLI:EU:C:2017:376 (EUSFTA), cons. 161.

¹⁰⁶ CJUE, aff. A-2/15, ECLI:EU:C:2017:376 (EUSFTA), cons. 162 et 166.

¹⁰⁷ *Szilárd Gáspár-Szilágyi*, Human Rights Conditionality in the EU's Newly Concluded Association Agreements with the Eastern Partners, in Akrivopoulou (ed), *Defending Human Rights and Democracy in the Era of Globalization*, 2017, 50 s.

constitutes a material breach of the agreement. Sometimes such an essential elements clause is linked to a non-execution clause which explicitly allows a Party to suspend (part of) or terminate an agreement for a material breach.¹⁰⁸

In the case of the EUSFTA, there is no specific suspension clause (similar to article 15.12 (2)) for the sustainable development chapter. Article 13.16 (1) states that

“in case of disagreement on any matter arising under this Chapter, the **Parties shall only have recourse to the procedures provided for in Article 13.16 (Government Consultations) and Article 13.17 (Panel of Experts)**. Chapter Fifteen (Dispute Settlement) and Chapter Sixteen (Mediation Mechanism) do not apply to this Chapter.”¹⁰⁹

The fact that the EUSFTA does not explicitly allow for cross-suspension (for instance, suspending the reduced tariff rates for certain categories of imported goods in the event of a breach of one of the environmental provisions), did not deter the Court from finding that a breach of Chapter 13 could constitute a material breach of the Treaty and therefore authorising the Parties to suspend the agreement under international treaty law. This approach is broader than that of AG Sharpston, who did not consider **international treaty law** generally, but instead focused on the **internal rules** of the EUSFTA. She therefore found that Chapter 13 could not result in suspension of the agreement because the EUSFTA did not explicitly provide for it.¹¹⁰

The Court’s findings might be justified with reference to article 17.13 of the EUSFTA. That provision allows both Parties to terminate the agreement. Implicitly, therefore the Parties would also be allowed to suspend the agreement (as it is less far-reaching). One could argue therefore that even if there is no explicit provision authorising the Parties to suspend the agreement for a breach of a provision in Chapter 13, it is undeniable that the agreement allows for termination (and implicitly suspension) generally. Consequently, Parties may terminate and suspend the agreement for any material breach, something the Court considers to be the case if a provision in Chapter 13 is breached.

3.1 Practicalities

The Court’s findings are significant as it may create an economic incentive for compliance with international social and environmental law and a recognition that the EU is trading on the basis of conditionality. In addition, it is from an EU law point of view an authoritative interpretation of how EU trade agreements operate.¹¹¹ As such, the Commission is not in a position to deny that suspension or termination of EU trade agreements is possible for violations of the environmental or social provisions contained in sustainable development chapters.

¹⁰⁸ *Lorand Bartels*. Human Rights and Sustainable Development Obligations in EU Free Trade Agreements, Legal Issues of Economic Integration, 2013, 297 s.

¹⁰⁹ The other FTAs contain similar provisions, see for the CETA (Note 92).

¹¹⁰ See Avocat General Sharpston, CJUE, aff. A-2/15, ECLI:EU:C:2016:992 (EUSFTA), cons. 491.

¹¹¹ International agreements concluded by the EU are an integral part of the EU legal order. See CJUE, aff. 181/73, ECLI:EU:C:1974:41 (Haegeman), cons. 5.

However, certain practicalities regarding the actual decision to suspend an agreement may cause less enthusiasm in particular because of the Commission's firm opposition to sanctions. First, from an EU point of view, such a decision would require the adoption of a Council decision following a proposal of the Commission on the basis of Article 218 (9) TFEU. A proposal by the Commission and a decision by the Council by qualified majority voting is likely not to be taken lightly and there may not be much appetite within those institutions to risk good diplomatic relations for social and environmental protection abroad. In relation to essential elements clauses, for instance, such a decision to partially suspend an agreement has only been taken once when the Council decided to partially suspend the Cooperation Agreement with Syria.¹¹² The Court's language might nonetheless suggest that such a decision is not entirely up to the political discretion of these two institutions by stating that "liberalisation of that trade [is made] subject to the condition that the Parties comply with their international obligations concerning social protection of workers and environmental protection".¹¹³

Second, it is not entirely clear **when** the Parties could suspend the application of the agreement. On the one hand, one could argue that simple notification of suspension would suffice. On the other hand, one could argue that there is a good faith obligation to resolve the issues first via the consultation procedures in article 13.16 and 13.17. The latter option would likely be preferred by decision-makers who already have difficulty starting such consultations in the first place.¹¹⁴ In that sense, it is not a good omen that the EU has never initiated consultations with a trade partner over social and environmental issues.

Conclusion

The days of caution and restraint by the EU with regard to international dispute settlement have long passed. The EU has engaged in a considerable effort in its current generation of FTAs to include and reform three forms of dispute settlement. However, while the EU's approach is certainly ambitious, it is also unbalanced and may even be constitutionally unviable.

The Investment Court System and the Multilateral Investment Court are the EU's attempts to grapple with the significant controversy surrounding its new powers under the Lisbon Treaty to negotiate agreements that contain ISDS. The EU's approach can perhaps best be characterized as seeking to ensure the ongoing viability of the ISDS system by improving its legitimacy. It is seeking to do so by changing the ad hoc nature of ISDS into a more institutionalised form of dispute settlement. These reforms are particularly aimed at improving the appointment process of the tribunal members, address conflicts of interest, and create more consistency in decision-making through the introduction of an appeal mechanism.

¹¹² Council Decision 2011/523/EU of 2 September 2011 partially suspending the application of the Cooperation Agreement between the European Economic Community and the Syrian Arab Republic, OJ 2011 L 228, 19.

¹¹³ CJUE, aff. A-2/15, ECLI:EU:C:2017:376 (EUSFTA), cons. 166.

¹¹⁴ The EU's Domestic Advisory Group of the EU-Korea FTA has repeatedly asked the Commission to start consultations with Korea over non-compliance with core labour provisions in the TSD chapter. See for instance <<http://europeanlawblog.eu/wp-content/uploads/2017/06/CM-signed-Reply-EU-Korea-FTA-EU-Domestic-Advisory-Groups-letter.tif-2.pdf>> (consulté le 15.06.2018).

On the other hand, the EU's approach does not reform other key criticised features of ISDS. In contrast to some investment agreements, the ICS in CETA is still only open to foreign investors and does not allow for claims or counter-claims against investors. The EU is also opposed to a requirement to exhaust domestic remedies. Such an approach would be more in line with international human rights law and customary international law and would also put local courts in the driving seat to resolve disputes between foreign investors and host governments.

At the same time, the and the Commission in particular are equally reluctant to reform its approach towards enforcement of its labour and environmental chapters in its trade agreements, despite increasing pressure from civil society and the European Parliament to do so. The Commission is committed to retain the specifically weaker forms of dispute settlement for these provisions and is fundamentally opposed to the idea of sanctions or penalties in the case of non-compliance.

In this context, it is noteworthy that the Commission and the ECJ appear to be at odds regarding the feasibility and meaning of these dispute settlement provisions. The ECJ appears to give more room to the Parties in terms of enforcement of the environmental and labour provisions, by allowing for the suspension and even termination of the agreement despite the limited wording of the dispute settlement provisions. The Commission, on the other hand, has taken an approach towards the Investment Court System that does not appear to muster the conditions set by the ECJ for international dispute settlement, thus seemingly going beyond what the EU Treaties permit.

Lastly, the Commission endorsed by the Council has initiated probably the most ambitious international dispute settlement project to date by the EU: the Multilateral Investment Court. This is an ambitious effort that is set to replace ISDS in at least 1200 investment agreements concluded by the Member States and all future EU investment agreements. The feasibility of this significant undertaking will not only depend on gathering sufficient international support, but also on the outcome in *Opinion 1/17*.